Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
All American Telephone Co.,	)	
e-Pinnacle Communications, Inc., and	)	
ChaseCom,	)	
	)	
Complainants,	)	File No. EB-10-MD-003
	)	
v.	)	
	)	
AT&T Corp.,	)	
	)	
Defendant.	)	

ORDER ON RECONSIDERATION

Adopted: March 22, 2013 **Released: March 25, 2013**

By the Commission:

I. INTRODUCTION

1. All American Telephone Co., Inc., e-Pinnacle Communications, Inc., and ChaseCom (collectively, the CLECs) filed a formal complaint with the Commission under section 208(a) of the Communications Act of 1934, as amended (the Act).[1] On January 20, 2012, the Commission denied that complaint in the *Complaint Denial Order*.[2] Thereafter, the CLECs filed a petition for reconsideration or clarification of the *Complaint Denial* Order,[3] under section 405(a) of the Act, and rule 1.106.[4] For the reasons explained below, the Petition is dismissed on procedural grounds, and alternatively, denied on the merits.[5]

[1] 47 U.S.C. § 208(a).

[2] *All American Tel. Co. v. AT&T Corp.*, Memorandum Opinion and Order, 26 FCC Rcd 723 (2011) (*Complaint Denial Order*).

[3] Petition for Reconsideration or Clarification of All American Telephone Co., Inc., e-Pinnacle Communications, Inc., and ChaseCom, File No. EB-10-MD-003 (filed Feb. 22, 2011) (Petition); *see also* AT&T's Opposition to Petition for Reconsideration, File No. EB-10-MD-003 (filed Mar. 4, 2011) (Opposition); Reply in Support of Petition for Reconsideration or Clarification of All American Telephone Co., Inc., e-Pinnacle Communications, Inc., and ChaseCom, File No. EB-10-MD-003 (filed Mar. 11, 2011) (Reply).

[4] 47 U.S.C. § 405(a); 47 C.F.R. § 1.106.

[5] The Commission previously dismissed the Petition for Reconsideration or Clarification of Aventure Communication Technology, L.L.C. and Petition of Qwest Communications Company, LLC to Accept Opposition Filing. Both Aventure and Qwest were non-parties in this proceeding. *See All American Co. v. AT&T Corp.*, Order, File No. EB-10-MD-003 (Enf. Bur. Oct. 27, 2011). *See also* Petition for Reconsideration or Clarification of

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II. BACKGROUND

2. At all relevant times, the CLECs purported to provide terminating interstate switched access services to AT&T Corp. (AT&T), an interexchange carrier (IXC), pursuant to federal tariffs that the CLECs filed with the Commission.[6] The CLECs charged AT&T for terminating interstate switched access services, but AT&T refused to pay, asserting that the CLECs were not providing such services in accordance with their federal tariffs.

3. The CLECs sued AT&T in federal district court to collect the access charges billed, asserting claims alleging, *inter alia*, that AT&T's refusal to pay violated the CLECs' federal tariffs, section 201(b) of the Act, and section 203(c) of the Act.[7] Upon the CLECs' request—to which AT&T objected—the federal district court referred the following issues, among others, to this Commission under the primary jurisdiction doctrine:

> (i) Did AT&T violate § 201(b), § 203(c), or any other provision of the Communications Act by refusing to pay the billed charges for the calls at issue?
>
> (ii) Did AT&T violate any provision of the Communications Act by refusing to pay the billed charges for the calls at issue and not filing a rate complaint with the FCC?[8]

4. At the direction of Commission staff, the CLECs effectuated the court's primary jurisdiction referral by filing a formal complaint against AT&T under section 208 of the Act. The CLECs' complaint alleges that, by refusing to pay the billed access charges rather than paying those charges and filing a rate complaint against the CLECs with this Commission, AT&T violated sections 201(b) and 203(c) of the Act.

5. After the pleading cycle closed, the Commission released the *Complaint Denial Order* denying the CLECs' claims. Specifically, the Commission stated:

> [T]he answer to both of the Court's questions addressed in this Order is "no." AT&T did not violate sections 201(b), 203(c), or any other provision of the Communications Act by refusing to pay the billed charges for the calls at issue, regardless of whether it filed a rate complaint with the FCC. Accordingly, the CLECs' claims are denied.
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> Under section 208 of the Act, the Commission has authority to adjudicate only claims alleging that a carrier has somehow violated the Act itself. . . . [T]he Commission has repeatedly held that an allegation by a carrier that a customer has failed to pay charges specified in the carrier's tariff fails to state a claim for violation of any provision of the Act, including sections 201(b) and 203(c) – even if the carrier's customer is

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Aventure Communication Technology, L.L.C., File No. EB-10-MD-003 (filed Feb. 22, 2011); Petition of Qwest Communications Company, LLC to Accept Opposition Filing, File No. EB-10-MD-003 (filed Mar. 4, 2011).

[6] This is an abridged (and non-annotated) description of the factual and legal background. The *Complaint Denial Order*, 26 FCC Rcd at 724–26, paras. 3–8, contains a more complete discussion of the background.

[7] 47 U.S.C. §§ 201(b), 203(c).

[8] *All American Tel. Co., Inc. v. AT&T Corp.*, Order Referring Issues to the Federal Communications Commission, Case No. 1:07-cv-00861-WHP, at 3 (S.D.N.Y. Feb. 5, 2010) (*Referral Order*).

> another carrier. These holdings [the *Collection Action Orders*[9]] stem from the fact that the Act generally governs a carrier's obligations to its customers, and not vice versa. Thus, although a customer-carrier's failure to pay another carrier's tariffed charges may give rise to a claim in court for breach of tariff/contract, it does not give rise to a claim at the Commission under section 208 (or in court under section 206) for breach of the Act itself.
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> * * *
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> Applying the foregoing precedent to the instant case, the CLECs' claims that AT&T violated the Act must be denied. Each of the CLECs' three claims hinges on the contention that either section 201(b) or section 203(c) of the Act requires AT&T to pay the CLECs' tariffed access charges. In other words, each of the claims is exactly the kind of "collection action" that the Commission has repeatedly held fails to state a claim for violation of the Act.[10]

III. DISCUSSION

6. We have reviewed the CLECs' Petition and Reply. All of the CLECs' arguments either (i) have been fully considered and rejected by the Commission in the *Complaint Denial Order*,[11] or (ii) could and thus should have been made prior to the *Complaint Denial Order*.[12] For example, to support their contention that a failure to pay allegedly tariffed charges constitutes a violation of the Act, the CLECs persist in relying on the same out-of-context snippets from old Commission orders[13] that the *Complaint Denial Order* already distinguished or reconciled.[14] The Petition offers nothing to undermine

[9] *See Complaint Denial Order*, 26 FCC Rcd at 727, n.32 (citing the *Collection Action Orders*).

[10] *Complaint Denial Order*, 26 FCC Rcd at 726–28, paras. 9–11 (footnotes omitted).

[11] *Compare* Petition at 10–11 (the Commission lacks authority to rule dispositively on the court referral); *id.* at 12–19 (the *Complaint Denial Order* is inconsistent with Commission and court precedent); *id.* at 19–22 (IXCs are not exempt from the obligations imposed by the Communications Act when they act "as a customer"); Reply at 2-4 (the *Complaint Denial Order* conflicts with Commission precedent); *id.* at 4–6 (the Commission lacks authority to rule dispositively on the court referral); *id.* at 6–8 (the *Complaint Denial Order* is inconsistent with court precedent), *with Complaint Denial Order* at 724–32, n.6, paras. 10–14, 16–20.

[12] *See Qwest Communications Company, LLC v. Northern Valley Communications, LLC*, Order on Reconsideration, 26 FCC Rcd 14520, 14522–23, paras. 5–6 (2011) (declining to revisit arguments that the Commission addressed and rejected in the underlying order and finding reconsideration unwarranted with respect to arguments that the petitioner previously had an opportunity to present in response to the underlying complaint).

[13] Petition at 7, 12–16, 21 (citing *Communique Telecomms., Inc. d/b/a LOGICALL*, Declaratory Ruling and Order, 10 FCC Rcd 10399 (1995); *Business WATS, Inc. v. AT&T*, Memorandum Opinion and Order, 7 FCC Rcd 7942 (Comm. Car. Bur. 1992); *MCI Telecomms. Corp. v. AT&T*, Decision, 94 F.C.C.2d 332 (1983); *Carpenter Radio Co.*, Memorandum Opinion and Order, 70 F.C.C.2d 1756 (1979); *Bell Tel. of Pa.*, Memorandum Opinion and Order, 66 F.C.C.2d 227 (1977); *MCI Telecomms. Corp.*, Memorandum Opinion and Order, 62 F.C.C.2d 703 (1976)); Reply at 3–6.

[14] *Complaint Denial Order*, 26 FCC Rcd at 728, para. 13 & nn.37–41. In fact, it was the Commission in the *Complaint Denial Order*—not the CLECs in their pleadings—who first noted the existence of two of the Commission orders on which the Petition mistakenly relies. *Complaint Denial Order*, 26 FCC Rcd at 729 n.41. In any event, we find these snippets to be no longer good law, for the same reasons that the *Complaint Denial Order* explained regarding *MGC v. AT&T*. *MGC Communications, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 11647 (Com. Car. Bur. 1999), *aff'd, MGC Communications, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 308 (1999) (collectively, *MGC v. AT&T*). The *Complaint Denial Order* cited the

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the *Complaint Denial Order*'s conclusion. Accordingly, we summarily dismiss the Petition on procedural grounds.[15]

7. Nevertheless, as an independent and alternative basis for this decision, we deny the Petition on the merits to the extent described below. First, it appears that underlying the Petition is a concern that the *Complaint Denial Order* may deprive the CLECs (and other similarly-situated local exchange carriers) of any forum in which to pursue collection actions against AT&T (and other similarly-situated IXCs) to recover access charges allegedly due under federal tariffs.[16] The *Complaint Denial Order* does no such thing. The *Complaint Denial Order* makes clear that "a customer-carrier's failure to pay another carrier's tariffed access charges may give rise to a claim in court for breach of tariff/contract . . . ."[17] Thus, as even AT&T acknowledges, the *Complaint Denial Order* does not hinder the CLECs' ability to prosecute their court claims for breach of their federal tariffs.[18]

8. Second, we are perplexed by the CLECs' request that we issue an order (i) reversing the *Complaint Denial Order*, (ii) holding that "the Commission lacks jurisdiction to hear the questions referred by the SDNY Court, and [(iii)] dismissing the complaint without prejudice."[19] After all, it was the CLECs who, over AT&T's objection, successfully urged the federal district court to refer to the Commission the very questions we addressed in the *Complaint Denial Order*.[20] If it is true, as the Petition strongly suggests,[21] that the CLECs always understood the *Collection Action Orders* as precluding the Commission from ruling favorably on the merits of their claims, then it is troubling that

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following reasons: (1) at least one federal district court had already noted that the Commission "ha[d] questioned the continuing validity and scope of the *MGC* decision" since its adoption, (2) the Commission had re-affirmed the *Collection Action Orders* at least six times, and noted the incongruity of *MGC v. AT&T* at least twice, and (3) the only question discussed extensively in *MGC v. AT&T* was *not* whether a failure to pay access charges was a violation of the Act, but "whether AT&T took the appropriate steps effectively to terminate the arrangement with MGC for the acceptance of originating access traffic." It then expressly overruled *MGC v. AT&T*. *Complaint Denial Order*, 26 FCC Rcd at 731–32, para. 20.

[15] *See, e.g.*, 47 C.F.R. §§ 1.106(c)(1), (p)(1)–(3). The CLECs argue that the *Complaint Denial Order* is vague. *See, e.g.*, Petition at ii–iii, 4, 22–24; Reply at 8–10 (claiming, among other things, that the *Complaint Denial Order* is "rife with internal inconsistencies" because it (1) creates in a complaint proceeding broad and dispositive legal principles that have industry-wide effect, (2) makes several unsupported statements, and (3) has been interpreted differently by various parties). However, the CLECs' vagueness argument actually rests on the very same points that either the *Complaint Denial Order* already considered or that the CLECs could and should have made prior to the *Complaint Denial Order*. In other words, the CLECs' assertions of vagueness really argue that the *Complaint Denial Order* is wrong, not that the *Complaint Denial Order* is ambiguous. Thus, the CLECs' assertions of vagueness warrant summary dismissal for the same reasons that the rest of the CLECs' arguments do.

[16] Petition at 5–6, 16–17, 19; Reply at 2, 7–8.

[17] *Complaint Denial Order*, 26 FCC Rcd at 727, para. 10.

[18] AT&T's Opposition at 2, 10–11, 18, 20–21. The CLECs also misread the *Complaint Denial Order* as holding that one carrier's failure to pay another carrier's charges can never constitute a violation of the Act. *See, e.g.*, Reply at 8. By its plain terms, the *Complaint Denial Order* pertains only to circumstances governed by section 203 of the Act. *See Complaint Denial Order*, 26 FCC Rcd at 726–28, paras. 9–11, 729, para. 14, 732, paras. 21–24.

[19] Petition at iii, 10–12, 25; Reply at 3–5, nn.3, 10.

[20] *See Referral Order*; *see also All American Tel. Co., Inc. v. AT&T Corp.*, Memorandum in Support of Motion for Referral to Federal Communications Commission, Case No. 1:07-cv-00861-WHP (filed Nov. 30, 2009); *All American Tel. Co., Inc. v. AT&T Corp.*, Reply Memorandum in Support of Plaintiffs' Motion for Referral to Federal Communications Commission, Case No. 1:07-cv-00861-WHP (filed Dec. 22, 2009).

[21] Petition at 7; Reply at 4–6; *see Complaint Denial Order*, 26 FCC Rcd at 728, para. 12.

the CLECs put the court, the Commission, and AT&T through the time, effort, and expense of this primary jurisdiction referral process regarding the questions resolved in the *Complaint Denial Order*.

9. We give no credence to the CLECs' contention that the *Collection Action Orders* apply only to the Commission's formal complaint proceedings under section 208 of the Act, and not to other Commission processes that the Commission could have employed, but chose not to employ, to resolve the questions referred by the court.[22] Even if the Commission were to have decided the referred issues in a declaratory ruling proceeding as the CLECs desired, the substantive answer to the question whether certain conduct violates the Act would be the same.[23] The answer does not turn on the procedural mechanism chosen by the Commission to address the question.[24]

10. Similarly unfounded is the CLECs' assertion that an IXC's failure to pay allegedly tariffed access charges can constitute a claim for violation of the Act cognizable in a court proceeding, even though the *Collection Action Orders* hold that the very same conduct does *not* constitute a claim for violation of the Act cognizable in a Commission proceeding under section 208 of the Act.[25] Under the plain language of sections 206-208 of the Act,[26] both the Commission and courts can award relief only upon finding a violation of the Act. Thus, just as the substantive answer to a question concerning construction of the Act does not turn on the Commission procedure employed to address the question, the substantive answer also does not turn on whether the Commission or a court is employed to address the question.

11. That said, as we explained in the *Complaint Denial Order* and in our first point above, a court's authority does differ from the Commission's in one relevant respect: A federal court *can* adjudicate a local exchange carrier's claim seeking to enforce an IXC's access charge payment obligations under a federal tariff, whereas the Commission cannot under the long-standing precedent that "collection actions" fail to state a claim for violation of the Act. And this distinction is reinforced, not undermined, by the six court decisions cited by the CLECs in their Petition.[27] According to the CLECs, those court decisions contradict the *Complaint Denial Order*'s holding that an IXC's failure to pay a local exchange carrier's tariffed access charges cannot constitute a violation of the Act. We disagree. Those court decisions simply hold that, because federal tariffs emanate from federal law, i.e., section 203 of the Act, a federal tariff is itself tantamount to "federal law," not merely a contract. Accordingly, a claim for breach of the payment obligations of a federal tariff "arises under" federal law within the meaning of 28 U.S.C. § 1331 and, in turn, such a claim falls within the subject-matter jurisdiction of federal courts.[28] Those six court decisions are thus fully consistent with the *Complaint Denial Order*'s holding that a

[22] Petition at ii–iii, 7–8, 10–11; Reply at 2–6.

[23] *See Complaint Denial Order*, 26 FCC Rcd at 724, n.6 (addressing this contention).

[24] *Id.*

[25] Petition at 12–19; Reply at 5–8.

[26] 47 U.S.C. §§ 206–208.

[27] Petition at 16–19 (citing *Cahnmann v. Sprint Corp.*, 133 F.3d 484 (7th Cir. 1998); *AT&T v. City of New York*, 83 F.3d 549 (2d Cir. 1996); *MCI Telecomms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086 (3d Cir. 1995); *Western Union Int'l Inc. v. Data Dev., Inc.*, 41 F.3d 1494 (11th Cir. 1995); *MCI Telecomms. Corp. v. Graham*, 7 F.3d 477 (6th Cir. 1993); *MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385 (8th Cir. 1992); *MCI Telecomms. Corp. v. Credit Builders of America, Inc.*, 980 F.2d 1021 (5th Cir. 1993), *vacated*, 508 U.S. 957 (1993)); Reply at 7–8, n.19.

[28] *See WorldCom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 653–54 (3d Cir. 2003); *Cahnmann v. Sprint Corp.*, 133 F.3d at 488; *MCI Telecomms. Corp. v. Teleconcepts, Inc.*, 71 F.3d at 1094; *Ivy Broadcasting Co., Inc. v. AT&T*, 391 F.2d 486, 490–91 (2d Cir. 1968).

court, and not the Commission, is the proper forum for local exchange carriers to raise federal tariff collection action claims against their IXC customers.[29]

IV. ORDERING CLAUSE

12. Accordingly, IT IS HEREBY ORDERED, pursuant to Sections 201, 203, 208, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201, 203, 208, 405, and Sections 1.106 and 1.720–1.736 of the Commission's rules, 47 C.F.R. §§ 1.106, 1.720–1.736, that the Petition for Reconsideration or Clarification of All American Telephone Co., Inc., e-Pinnacle Communications, Inc., and ChaseCom is DISMISSED on procedural grounds and, in the alternative, DENIED for the reasons stated herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[29] *Complaint Denial Order*, 26 FCC Rcd at 727; *see, e.g.*, *Southern New England Telephone Co. v. Global NAPs*, 624 F.3d 123 (2d Cir. 2010) (federal question jurisdiction exists over a suit to enforce the payment provisions of a federal tariff).